FILED
NOV 17, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CORNELL BEAN, Petitioner, v. **ARTHUR CALDERON,** Respondent.	Civ. S-90-0648 EJG GGH DEATH PENALTY CASE FINDINGS AND RECOMMENDATIONS

Respondents' motion to dismiss, filed July 18, 1995, came on for hearing October 12, 1995, before the undersigned. Andrea M. Miller and Andrew S. Love appeared for petitioner. Clayton S. Tanaka and Harry Columbo appeared for respondent. Having reviewed the motion and the documents in support and opposition and heard the arguments of counsel, the

court has determined that respondent's motion to dismiss for procedural default should be denied.

BACKGROUND

In July, 1981 a jury convicted petitioner of the murders of Beth Schatz and Eileen Fox. Petitioner was sentenced to death for the murder of Beth Schatz and to life without possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed petitioner's convictions on appeal. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988), cert. denied 494 U.S. 1038 (1990). After the California Supreme Court relieved petitioner's state-appointed counsel in April, 1990, petitioner, acting in propria personam, applied in May 1990 to this court for a stay of execution and for the appointment of counsel. On July 26, 1990, this court appointed counsel to represent petitioner. Counsel filed in this court on July 18, 1991, a petition for writ of habeas corpus.

On September 26, 1991, this court issued its order staying the case, allowing petitioner to exhaust his state remedies. On May 26, 1994, counsel for petitioner filed a state petition for writ of habeas corpus. On February 22, 1995, the California Supreme Court denied the state petition without issuing an order to show cause and without holding an evidentiary hearing.

The state supreme court denied the state habeas petition on exhaustion on three grounds:

1. all claims were denied as untimely raised;

2. 39 claims were barred on account of the failure to raise them properly on direct appeal or at trial;

3. 10 claims were denied on their merits as failing to state a prima facie case entitling petitioner to relief (whether based on state law or federal law was not revealed).

Petitioner notified the court of exhaustion of remedies, re-opened this proceeding, and filed an amended petition for writ of habeas corpus on March 22, 1995. Respondents filed a preliminary answer on June 8, 1995, and on July 21, 1995, filed the present motion to dismiss based on procedural default. Because it is an affirmative defense and because respondents move for dismissal, respondents bear the burden of establishing that California's procedural default rules are adequate to bar federal review. Karis v. Vasquez, 828 F.Supp. 1449, 1463 n. 21 (E.D. Cal. 1993). The court discusses in turn each ground of denial stated by the California Supreme Court.

PROCEDURAL DEFAULT

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a

state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims " . . . unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (citations omitted). Federal questions should be reached only "when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for that decision." Coleman at 735.

To be independent of federal law, a state procedural practice must not "depend upon an

antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

If the state court decision is supported by an independent and adequate state ground, the federal

court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991) (quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice"

exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Analysis

a. Timeliness

In the instant case, the California Supreme Court, citing In re Clark, 5 Cal.4th 750, 774-775, (21 Cal.Rptr.2d 509) (1993), issued an opinion which first denied petitioner's entire state habeas petition "on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims."

Even respondent concedes that the California Supreme Court's overall timeliness ruling is

overbroad. The ruling seemingly encompasses even those claims that had been timely raised on direct appeal, but which were "re-exhausted" in the state habeas petition filed after initial proceedings in this court. Of course, the fact that petitioner has exhausted claims "too much" has never been held to be a procedural bar to a claim that is otherwise devoid of procedural taint. However, because of the court's findings with respect to the remainder of the "untimely" claims, it is not necessary to segregate the old claims from the new ones.

A brief review of the history of the California courts' timeliness bar is instructive in determining this basis for the court's ruling. The California courts have generally disfavored unduly delayed petitions. See, e.g., People v. Jackson, 10 Cal.3d 265, 110 Cal.Rptr. 142 (1973); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633 (1970). However, the early cases provided little guidance as to just what

constituted undue delay or what would excuse a finding of undue delay. In re Stankewitz, 40 Cal.3d 391, 396-97 n. 1, 220 Cal.Rptr. 302 (1986), the court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay." However, the court did not define how much delay was "substantial."

In 1989, the California Supreme Court established standards, including timeliness standards, for filing habeas corpus petitions in capital cases. Those standards require appellate counsel to investigate possible bases for a habeas petition. California Supreme Court, Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases, 50 Cal.3d 1-4 (Dec. 1993). A petition filed within 60 (now 90) days of the filing of the appellate reply brief is presumed timely. Id.

Petitioners who did not file within this time period could establish an absence of substantial

delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual bases for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2 (emphasis in original). Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the final date of Stankewitz] . . . the petition was filed within a reasonable time after that date." Standard 1-1.3. Petitioners failing to meet these standards could seek to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2.

In 1993, the California Supreme Court clarified its timeliness rules and set forth specific exceptions to the timeliness bar. In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). The court reviewed the

state procedural limitations applicable to petitions for habeas corpus, including the rules applicable to delayed petitions, repeated petitions, and piecemeal presentation of claim. In describing prior state practice limiting habeas corpus relief, the court stated: "because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted." Id. at 763.

The Ninth Circuit, agreeing that no clear state procedural guidelines existed, has held that, at least prior to 1993, California courts inconsistently applied the state timeliness standards. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert denied, 115 S.Ct. 1175 (1995); see also, Karis v. Vasquez, 828 F.Supp. 1449, 1463 (E.D. Cal. 1993).

The California Supreme court cited Clark in the instant case as a bar to petitioner's state habeas petition. In doing so, the Court retroactively applied Clark because, by definition, the timeliness bar means

petitioner should have raised the claims earlier. The problem is that, although petitioner filed the state habeas petition at issue in this case after Clark, at the time petitioner should have raised the claims, i.e., within a reasonable time after the final date of Stankewitz, Clark was not the law.[1/] The question then is whether the federal court should respect the state court's retroactive application of its Clark timeliness rules to bar consideration of petitioner's claims.

Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second

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1/ Petitioner's conviction was affirmed on appeal on September 19, 1988, at a time when both the pre-Clark and pre-Standards procedural rules were in effect. Stankewitz was the applicable law concerning timeliness of state habeas petitions. Petitioner filed his state "exhaustion" habeas petition prior to the Clark decision as well.

petition had been denied as untimely by the California Supreme Court, citing Clark. The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900.

In summarily determining that retroactivity was not a problem, the district court in Deere did not discuss two important points. First, it failed to consider that, as described above, the California Supreme Court itself acknowledged that its timeliness rules were

sporadically applied, and understood its opinion in Clark to mark a significant change in its use of the timeliness rules.[2/] Second, the Deere court failed to examine the retroactivity issue as applied to the law of procedural default. Most importantly in the last respect, Deere is contrary to Supreme Court and Ninth Circuit authority.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim should

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2/ Clark itself is inconsistent in its characterization of the past fidelity of the state courts to apply procedural bar to state habeas petitions on account of untimeliness. At one point, Clark intimates that Stankewitz simply affirmed the longstanding practice that required petitions to be timely filed, Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530-531; at another, Clark implicitly concedes that the Stankewitz bar was not consistently applied. Id. at 786, 21 Cal.Rptr.2d at 533. In addition, insofar as the discovery of new claims is concerned, Clark expressly concedes that prior to 1989, counsel had no obligation to investigate the possibility of new claims. Id. at 783, 21 Cal.Rptr.2d at 531.

have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

Respondent can legitimately argue that the above cited law permits petitioner to claim that prior to Clark, he had a "right" to file a belated state habeas petition, and that California law certainly has never stood for that proposition. While respondent may be correct in this assertion, the issue here is whether

California law was sufficiently, consistently applied in the past (pre-Clark) with respect to untimely petitions, and this court is bound by the Ninth Circuit holding that it was not. This court is further bound by the Supreme Court and Ninth Circuit holding that any procedural default must be judged at the time the alleged default was incurred. Because any potential default herein was incurred during the pre-Clark period (see footnote 1, supra), no procedural default (bar) may be entered on account of an "untimely" petition.[3/]

B. Failure To Raise Claim On Direct Appeal Or At Trial

Citing In re Harris, 5 Cal.4th 813, 826 (21 Cal.Rptr.2d 373) (1993), Clark and In re Waltreus, 62 Cal.2d, 218, 225 (42 Cal.Rptr. 9) (1965), the California Supreme Court rejected 39 claims as "also procedurally

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3/ Petitioner argues in opposition to the motion to dismiss that California's procedural rules remain as unclear after Clark as before. For purposes of this motion, this court need not decide that issue.

barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." This ambiguous portion of the opinion does not indicate which of the cases cited as presenting procedural bars applies to which claim, or which claims are barred by the appeal or trial defaults.

In re Waltreus does not present a procedural bar to consideration of a claim by a federal court. Waltreus stands for the California rule that issues resolved on appeal will not be reconsidered in a petition for habeas corpus. The California Supreme Court cites to Waltreus when a state petitioner has attempted to raise issues in state habeas corpus proceedings that he already raised on direct appeal. Waltreus holds that "habeas corpus ordinarily cannot serve as a second appeal." Id. As the Supreme Court clearly stated in Ylst v. Nunnemaker, 501 U.S.797, 806, 111 S.Ct. 2590, 2596 (1991), all Waltreus stands for is the "ordinary state rule barring relitigation of claims

raised on direct appeal"; it is uninformative of the issue of procedural bar. Id. Therefore, a citation to Waltreus does not mean that this claim is procedurally barred.

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759 (1953). In re Harris, cited by the California Supreme Court in denying petitioner's state habeas petition announced the court's intention to apply the Dixon rule more consistently in the future. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of Bean's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not consistently applied by the California Supreme Court. Odle v. Calderon, 884

F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Finally, although there are several trial level procedural defaults that most probably have been consistently followed in the past, e.g., failure to object to prosecutorial misconduct, the California Supreme Court did not identify which claims were subject to what default, or what the specific default problem was with a particular claim. This court is not in the position to speculate on behalf of the California Supreme Court.

PRIMA FACIE CASE

In denying petitioner's state habeas petition, the California Supreme Court, again citing Clark at (797-798) rejected ten claims as having been considered on the merits, and that the claims failed to state a prima facie case for relief. As to these claims, respondent, citing Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) argues unpersuasively that they are unexhausted. Respondent asserts that because the state

court found that petitioner failed to state a prima facie case with respect to these ten claims, petitioner has not exhausted those claims. Respondent does not specify whether he contends petitioner has legally or factually failed to exhaust the claims which the California Supreme Court has found not to state a prima facie case. The statement of the California Supreme Court that petitioner has not stated a prima facie case (a matter not considered at all by Jackson v. Cupp), means exactly what it says, , the court has considered the matters on the merits and has found them wanting. The denying of a claim on the merits has nothing to do with exhaustion except to indicate that exhaustion has occurred.[4/] The state court was presented with the

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4/ Perhaps respondent was confusing the situation here with the Jackson v. Cupp statement that where state remedies remain available, exhaustion has not been satisfied. However, this is not the case here. The ten claims were considered on the merits and were denied. There are no available state remedies remaining for these claims. It is also possible that respondent is confusing the In re Swain, 31 Cal.2d 300, 209 P.2d 793 (1934), doctrine

"opportunity" to rule on the merits of the claims, Jackson v. Cupp, 693 F.2d at 869, and it did so; such claims are exhausted. Id. Moreover, such a holding as was made by the state supreme court in this case (denial on the merits for failure to state a prima facie case) is inconsequential to the federal courts for two reasons: (1) the state supreme court did not specify whether it denied the claims based on state or federal law; (2) if based on federal law, the federal court is not

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with the situation here. Swain stands for the proposition that the petitioner has failed to state the facts clearly enough for the state supreme court to rule on the merits, and by definition, the court has therefore not ruled on the merits. See, Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Such unclear claims are not exhausted. However, again, the state supreme court did reach the claims on the merits.

In the case at bar, respondent would have this court send the ten "unexhausted" claims back to state court for further determination on the merits which inevitably would result in another ruling that the claims fail to state a prima facie claim, which would then require another remand for exhaustion, which would be followed by yet another ruling. . . .Nothing in habeas corpus law requires such a volley.

bound by such a general statement in any event (Jackson v. Cupp, 693 F.2d at 869).

Therefore, the state supreme court denial of certain claims on the merits does not implicate failure to exhaust or procedural default.

FAILURE TO PRESENT A FEDERAL CLAIM

Respondent's argument that certain claims do not present a federal claim is premature. The court will not make this determination at the present time.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss be denied in its entirety.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 13, 1995.

UNITED STATES MAGISTRATE JUDGE